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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 379

HAROLD G. FREUND,
Petitioner,

v.

GULF, MOBILE AND OHIO RAILROAD COMPANY,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals,
Eighth Circuit,
and
BRIEF IN SUPPORT THEREOF.

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GULF, MOBILE AND OHIO RAILROAD COMPANY,
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Respondent.

PETITION FOR WRIT OF CERTIORARI

To the U. S. Court of Appeals, Eighth Circuit.

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Harold G. Freund, and respectfully petitions this Honorable Court to grant and to issue its Writ of Certiorari directed to the United States Court of Appeals, Eighth Circuit (hereinafter referred to for convenience as

the Lower Court), directing it to send to this Court for review its original opinion rendered August 9, 1950, in this case lately there pending, styled Gulf, Mobile and Ohio Railroad Company, a corporation, Appellant, v. Harold G. Freund, Appellee, No. 14,049 on the docket of said Court, wherein the Lower Court reversed the judgment of the District Court of the Eastern Division of the Eastern Judicial District of Missouri, in said cause in favor of appellee and against Gulf, Mobile and Ohio Railroad Company, a corporation, and directed that the action be dismissed.

Your petitioner further states that he timely presented to the Court Below and filed therein his petition for a rehearing of said cause, which said petition for rehearing was overruled by said court on the 15th day of September, 1950.

OPINION OF THE COURT BELOW.

The opinion of the Court Below, which is by this petition sought to be reviewed, appears on pages 74 to 91, inclusive, of the printed Transcript of the Record filed herein. The opinion has not yet been officially published in the official reports.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Title 28, United States Code (Judiciary and Judicial Procedure), Section 1254, providing for review by this Court, by certiorari, of cases in the United States Courts of Appeals.

QUESTIONS PRESENTED.

1.

Does the action of the Lower Court in reversing a verdict and judgment in favor of your petitioner and directing that the action be dismissed, when the evidence is conflicting and there is sufficient evidence upon which to sustain the judgment and verdict in favor of your petitioner, deprive your petitioner of his right of trial by jury?

2.

Does the decision of the Lower Court fail to give effect to and apply the applicable law on the issue of whether negative evidence, respecting signals, raises an issue of fact for the jury?

3.

May the Lower Court in reaching its conclusion that there was insufficient evidence upon which to base a verdict and judgment in favor of your petitioner disregard evidence together with the inferences that may be reasonably drawn therefrom favorable to your petitioner and consider only the evidence offered in opposition thereto?

4.

May the Lower Court, in deciding the question of whether petitioner was guilty of contributory negligence as a matter of law under the rule that where reasonable minds differ on the subject it becomes a question for the jury, reverse a verdict and judgment in favor of petitioner, when the members of the Lower Court differ on the question, one Judge dissenting?

STATEMENT OF THE MATTER INVOLVED.

This action was commenced in the Circuit Court of the City of St. Louis, State of Missouri, by Harold G. Freund, as plaintiff, against Gulf, Mobile and Ohio Railroad Company, a corporation, as defendant. Thereafter, a petition for removal of said cause to the District Court of the Eastern Division of the Eastern Judicial District of Missouri was filed by the said Gulf, Mobile and Ohio Railroad Company, a corporation, as defendant, on the grounds of Diversity of Citizenship, which said petition for removal was sustained and cause was removed to Division 1 of the said District Court, and was there entitled Cause No. 5,675. The object of said action was to recover damages against respondent for bodily injuries sustained by your petitioner as a result of the willful and wanton conduct and negligence of the respondent in the operation, maintenance, and control of its railroad. The Bill of Complaint, as amended (R. 4-7), alleged that on the 3rd day of January, 1947, and at all times since that date, the respondent was a common carrier by railroad in interstate commerce, being a corporation, and doing business in the State of Missouri; that on January 3, 1947, the petitioner sustained injuries when his automobile was struck and run into by a locomotive operated by respondent's agents and servants.

The complaint further alleged that said collision occurred at a railroad crossing where an open and public highway in the County of Monroe, State of Illinois, on which the petitioner was operating his automobile crossed the railroad tracks of the respondent. The complaint further alleged that the collision, injuries, and damage to the petitioner were directly caused by the willful and wanton misconduct on the part of the respondent in that the respondent willfully maintained the crossing without sufficient ballast between the rails of the said crossing so as to

provide reasonably safe passage for motor vehicles traveling over the said highway, and in that the boards and timbers lying between and on each side of the rails of the track were not of sufficient length to provide safe passage to motorists, and that the respondent was guilty of willful and wanton misconduct in that after the petitioner's automobile became stalled on said crossing in the path of respondent's train, and although respondent's servants operating said train saw, or by the exercise of ordinary care could have seen, the petitioner and his automobile stalled on said crossing and in a position of imminent peril of being struck by respondent's train, respondent's servants failed to exercise any care to slacken the speed of the same or sound warning of the approach of the locomotive and thus avoid petitioner's injuries. Complaint further alleged that respondent was guilty of negligence on the occasioned mentioned, in that it failed to maintain the crossing so that it was in a reasonably safe condition for the passage of automobiles; that the respondent operated its locomotive and train at an excessive and dangerous rate of speed; and that they negligently failed to sound a crossing signal required by the statutes of the State of Illinois as the locomotive approached the said crossing. Respondent's Answer (R. 7-10) denied the allegation of negligence and pleaded contributory negligence as a defense.

The accident in this case occurred about 7:35 a. m. on January 3, 1947. The railroad tracks of the respondent at this crossing ran generally in a northerly and southerly direction with the public highway crossing at about a right angle (R. 19). The train involved in the collision approached the crossing from the south (R. 19-20). The petitioner approached the crossing in his Ford automobile at a slow rate of speed from the west and kept a lookout for approaching trains as he approached the crossing (R. 19, 26). As he approached the crossing, he was driving

on the southern portion of the road so that he would have better traction, the highway being covered with ice and snow (R. 19). Due to the cloudy and foggy condition, the visibility at this point was reduced to 600 to 700 feet (R. 21, 27). Both windows on the side of petitioner's automobile were open to prevent steam from forming (R. 19). As petitioner drove his automobile onto the tracks, he felt his car drop. It then moved a foot or so and the motor stopped. After his motor stopped, he looked both ways and saw no train. He then started the motor and tried to move on. The steering felt peculiar, and he tried to pull the car to the left, and the motor died. He again started the motor and intended to back off the tracks, and at that time he saw a train approaching from the south about 150 feet away. He tried to get out of the car and got the car door open part-way but did not get out before the train struck the right-hand side of his car (R. 19, 20). The petitioner's evidence showed that no whistle was sounded by the train as it approached the crossing nor at any time prior to the collision (R. 19, 27, 28, 29). He testified that his windows were open enough for him to hear and that his hearing and eyesight were good (R. 27); that he was always on the watch for a train (R. 28); and that if a whistle had been sounded, he would have heard it (R. 27, 29). It was admitted by the defendant that the train approached the crossing at the speed of 30 to 40 miles per hour, and the speed was not diminished until at the time of the collision (R. 34, 35). Respondent's witness testified that with the train traveling at the speed of forty miles per hour, application of brakes would reduce the speed to about twenty miles per hour within four hundred feet, and within six hundred feet, the train would not be moving very fast (R. 50). The petitioner testified that he was stalled on the crossing from 10 to 15 seconds (R. 21, 28).

The evidence as to the crossing showed that it was constructed of 16-foot planking on the northern portion which

covered the entire space between the rails. At the southern end, 4-foot planking was laid along the inside and outside of either rail, but the space between the rails was not planked but contained ballast, this being from 4 to 6 inches beneath the top of the rails (R. 14, 32, 36). As to the 4-foot plank inside the east rail, the evidence showed that there was a 4-inch wedge-shaped gap where this plank joined onto the 16-foot planks (R. 14, 32, 39). The crossing had been in this condition for several years, and no work had been done on it for at least 5 years (R. 32, 38). The evidence showed that the highway was about 20 feet wide (R. 19) and the space that included the 4-foot plank was part of the travelled portion (R. 14, 29, 32, 33, 36); that it was necessary when automobiles met at the crossing for that portion of the highway to be used (R. 32, 36). One witness testified that he had "bumped over those ties (short timbers)" (R. 32). The above testimony was borne out by the respondent's witnesses (R. 36, 37).

As a result of the collision, petitioner suffered severe injuries among which was the loss of his right eye (R. 20). The petitioner was 46 years of age and a licensed doctor in the State of Missouri, having graduated from medical school in 1933. He had completed seven and one-half years as a medical missionary in Central India. After returning from India, he went into the Navy as a doctor and was overseas for nineteen months in the South Pacific. At the time of the accident, he was stationed at the Veterans Hospital at Jefferson Barracks, Missouri, doing neuropsychiatric work (R. 17-18).

The jury was instructed that under the law of Illinois, it was the duty of the railroad company to so construct and maintain the public crossing that it would at all times be reasonably safe to persons and property, and to construct and maintain the grade crossing so that roadway at the crossing would be flush at the rails [Plaintiff's In-

struction No. 2 (R. 55)], and that the statutes of the State of Illinois required that when a railroad train is approaching a public crossing and when the train is at least 80 rods from the crossing, either the whistle of the locomotive shall be sounded or the bell shall be rung, and the whistle shall be sounded at intervals or the bell shall continue to be rung until the locomotive of said train reaches the crossing [Plaintiff's Instruction 3 (R. 56)].

The case was submitted to the jury upon the wilfulness and wantonness of the defendant in failing to slacken the speed of the train or give warning after plaintiff came into a position of imminent peril and in knowingly maintaining the crossing in a defective and dangerous condition. The jury was instructed that wilfulness and wantonness means: (1) Consciousness on the part of the defendant that his conduct would naturally and probably result in injury to another, or (2) intentional disregard of a known duty, or (3) such absence of care for the life, limb, and property of others as exhibits a conscious indifference to consequences (R. 33-54).

Under this instruction, the jury were instructed that if they found and believed from the evidence that respondent knowingly maintained the crossing in a defective condition and knew that such condition threatened danger to motorists using the public road where it crossed over respondent's tracks, and that if they further found that the respondent was thereby guilty of wilfulness and wantonness, their verdict should be in favor of the petitioner. They were further instructed that if they found from the evidence that the petitioner's automobile became stalled on respondent's track while the respondent's train was approaching and was then in a position of imminent peril of being struck by respondent's train, and of injury to petitioner unless the speed of respondent's train was slackened, and if they found from the evidence that the persons

operating respondent's locomotive either saw, or by the exercise of ordinary care to keep a lookout would have seen, petitioner's automobile in such position of imminent peril in time for them, by the exercise of ordinary care, with the means and appliances at hand, to have slackened the speed of the train or given timely warning by the signalling device of the locomotive and thereby avoided the collision and injury to petitioner, but failed to do so, and that such failure on the part of respondent's servants constituted wilfulness and wantonness on their part, then their verdict should be in favor of the petitioner and that contributory negligence was no defense [Plaintiff's Instruction No. 1 (R. 53-55)].

Plaintiff's Instruction 2 instructed the jury on negligence of the respondent in failing to maintain the crossing so as to be reasonably safe for vehicles crossing the same (R. 55).

Instruction No. 3 instructed the jury as to the law of Illinois on the duty of the respondent to sound warning as the locomotive approached the crossing and the right of the jury to return a verdict in favor of petitioner if they found that the respondent failed to do so (R. 56).

Plaintiff's Instruction No. 6 instructed the jury on the question of contributory negligence and read as follows: "If you find from the evidence that plaintiff's automobile was caused to stall on defendant's track by reason of the defective condition of the crossing, as mentioned in other parts of these instructions, then in determining whether the plaintiff was guilty of negligence in remaining in his automobile until it was struck by the train, you will take into consideration whether the plaintiff had exercised ordinary care under the circumstances to look and listen for approaching trains after his automobile was stalled on the track, and whether he had reasonable grounds to

believe he could remove his automobile from the track, and if you find and believe from the evidence that plaintiff did exercise ordinary care under the circumstances to look and listen for and discover the train, but nevertheless did not discover it in time for him to remove himself from a position of danger, then you are instructed that plaintiff was not guilty of negligence in remaining in his automobile'' (R. 56).

The jury returned a general verdict in favor of petitioner and against the respondent in the sum of of twenty thousand dollars, and judgment was entered in accordance therewith on November 17, 1948 (R. 64). Thereafter, respondent filed its Motion for Judgment Notwithstanding the Verdict, or, in the alternative, for a New Trial (R. 65). This motion was overruled by the Court on July 18, 1949 (R. 69), and respondent filed its Notice of Appeal to the United States Court of Appeals for the Eighth Circuit on July 19, 1949 (R. 69).

The Court of Appeals by its opinion of August 9, 1950, reversed the judgment of the District Court and remanded with directions to dismiss the action (R. 74-92). Petitioner filed its Petition for Rehearing in due course (R. 93-108), which was overruled by the Lower Court on September 15, 1950 (R. 109). Petitioner's Motion for Stay of Mandate for thirty days was sustained on September 25, 1950 (R. 109).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

The Court of Appeals throughout its opinion overlooked evidence favorable to the petitioner and accepted as true, evidence contrary thereto, and the Court refused to consider reasonable inferences supported by the evidence favorable to petitioner's action. The Court of Appeals in so doing has so far departed from the ruling laid down by this Court that on appeal the evidence must be taken in the light most favorable to the plaintiff as to call for an exercise of this court's power of supervision.

2.

Even though the evidence was in dispute and there was sufficient probative evidence to sustain a verdict and judgment in favor of petitioner, the Court Below substituted its judgment for that of the jury, and in so doing, failed to follow the decision of this Court.

3.

The Court in holding petitioner's evidence to the effect that he was in a position to have heard the signals of the train if they had been sounded and that even though he was attentive, he heard no warning, constituted merely negative evidence and did not raise a question of fact for the jury on the issue of the negligence of respondent in failing to sound a warning as the train approached the crossing decided this question of local law in conflict with the applicable local decisions.

If the federal law is applicable to this question which the Lower Court failed to decide, then the Lower Court's opin-

ion is in conflict with the decisions of other Courts of Appeal on the same matter.

4.

In holding that there was insufficient evidence to raise a question of fact for the jury on the respondent's wilful and wanton conduct in the maintenance of the defective crossing and its wilful and wanton conduct in failure to sound warning or slacken speed of the train after its employees knew or by the exercise of ordinary care should have known that the petitioner was in a position of imminent peril, the Lower Court's opinion is in conflict with the applicable law of Illinois.

5.

On the issue of contributory negligence, the Lower Court failed to give effect to the law of Illinois that where there is any evidence which, with legitimate inferences that may be legally and justifiably drawn therefrom, tends to show the use of due care, then such question of due care is a question of fact for the jury, and if there may be a difference of opinion on the question so that reasonable minds will arrive at different conclusions, then it is a question of fact for the jury. One member of the Lower Court dissented on this question. This conclusively shows that reasonable minds differ on the evidence presented, and that the Lower Court usurped the function of the jury and did not follow the law of Illinois or the decisions of this Court.

PRAYER FOR THE WRIT.

Wherefore, petitioner prays that a writ of certiorari be issued by this Honorable Court directed to the United States Court of Appeals for the Eighth Circuit to the end that said opinion and judgment of said Court of Appeals

in said cause of Gulf, Mobile & Ohio Railroad Company, a corporation, appellant, v. Harold G. Freund, appellee, No. 14,049, in said Court of Appeals, be reviewed by this Court as provided by law, and that the judgment of the United States Court of Appeals for the Eighth Circuit in said cause be reversed and the judgment of the District Court therein be affirmed, and that petitioner have such other relief as to this Court may seem meet and proper.

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Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

A. It is only where there is an entire absence of any probative evidence that a verdict may be directed.

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916;
Tiller v. Atlantic Coastline R. Co., 318 U. S. 54, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610;
Bailey v. Central Vermont R. Inc., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;
Ellis v. Union Pac. R. Co., 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572;
Pa. R. R. Co. v. Goldie (C. C. A. 4), 182 Fed 2d 9, 12;
Elgin, Joliet & Eastern Ry. Co. v. Duffy, 191 Ill. 489, 492;
Bernier v. Ill. Cent. R. Co., 296 Ill. 464, 129 N. E. 747;
B. & O. R. Co. v. Felgenhauer, C. C. A. 8, 168 Fed. 2d 12, 16.

B. The Appellate Court in deciding the question as to whether there was sufficient probative evidence to make a question for the jury, must consider the evidence in the light most favorable to the petitioner together with all the reasonable intendments and inferences which might legitimately be drawn therefrom.

Galloway v. U. S., 319 U. S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458;
Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916;

Parsons v. Bedford, 3 Pet. 433, 28 U. S. 433, 7 L. Ed. 732;

B. & O. R. Co. v. Felgenhauer, C. C. A. 8, 168 Fed. 2d 12, 16.

C. In reversing the verdict and judgment in favor of petitioner and directing the cause dismissed, the Lower Court has deprived petitioner of a trial by jury to which he was entitled upon the conflicting evidence in violation of the Seventh Amendment to the Constitution of the United States.

Jacob v. City of New York, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166;

Dryfoos v. Scavenger Serv. Corp., C. C. A. Ill., 115 Fed. 2d 637;

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

II.

The ruling of the Lower Court that the petitioner's evidence to the effect that no warning was sounded as respondent's train approached the crossing constituted merely negative evidence and raised no question of fact for the jury is in direct conflict with the Illinois law.

Berg v. New York Central R. Co., 391 Ill. 52, 62 N. E. 2d 676, 681.

The Lower Court's decision is in conflict with the decision of other Courts of Appeals on the same matter.

Union Pac. R. Co. v. Burnham, C. C. A. 10, 124 F. 2d 500, 502;

Flannery v. N. Y., O. & W. R. Co., C. C. A. 2, 29 F. 2d 18, 19;

Norfolk & W. Ry. Co. v. Collingsworth, C. C. A. 6, 52 F. 2d 827.

III.

The Lower Court's holding that there was no evidence of wilful and wanton conduct of the respondent in maintaining a defective crossing or in failing to sound a warning or to slacken the speed of the locomotive as it approached the crossing is in direct conflict with the law of the State of Illinois.

Brown v. Ill. Term. Co., 319 Ill. 326, 150 N. E. 242, 151 A. L. R. 1;
Bernier v. Ill. Cent. R. Co., 296 Ill. 464, 129 N. E. 747;
Elgin, Joliet & Eastern R. Co. v. Duffy, 191 Ill. 489, 61 N. E. 432;
Chicago & Alton R. Co. v. Hogarth, 38 Ill. 371;
L. S. & M. S. R. Co. v. Bodemer, 139 Ill. 396, 29 N. E. 692.

IV.

The Lower Court may not by a divided opinion hold petitioner guilty of contributory negligence as a matter of law, and courts may not say what is or is not due care in unusual situations such as existed in the instant case.

Pokora v. Wabash Ry. Co., 292 U. S. 98, 104, 78 L. Ed. 1149, 1154;
Wilkerson v. McCarthy, etc., 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497;
Greenleaf v. Birth, 9 Pet. 292, 299, 9 L. Ed. 132, 30 U. S. 132;
Surdyk v. Indiana Harbor Belt R. Co., C. C. A. Ill., 148 F. 2d 795;
Ill. Cent. R. Co. v. Anderson, 184 Ill. 294, 303, 56 N. E. 331;
Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, 54 S. Ct. 580.

Inasmuch as the ruling of the Court of Appeals as to the probative value of so-called negative evidence and the

interpretation of the Illinois law pertaining to what constitutes wilful and wanton conduct and to when contributory negligence becomes a question of law is unsound and not in accord with applicable decisions of this court and in conflict with decisions of other Courts of Appeal and the courts of the State of Illinois, and the question as to the propriety of such rulings is not only fundamental to the further conduct of this case and the preservation of your petitioner's constitutional rights but vital to the trial of other like cases, and for clarification of issues not previously decided by this court, the writ should issue herein in accordance with the Court's practice in such a situation.

ARGUMENT.

I.

This is an action by petitioner to recover damages for personal injuries sustained by him when his automobile was struck at a public crossing by a locomotive of respondent. The trial in the District Court resulted in a verdict and judgment in petitioner's favor. On respondent's appeal to the Court of Appeals for the Eighth Circuit, that court rendered an opinion and entered an order reversing the judgment of the District Court and remanded with directions to dismiss the action. The facts have been set forth in petitioner's petition for writ herein and for that reason will not be here set forth in detail. The rule under which the Lower Court should have decided the issues in this case is that on appeal, the court must consider the evidence in the light most favorable to the plaintiff, together with all reasonable inferences and intendments that may be derived therefrom. The Lower Court recognized the existence of this rule, but failed to give any effect to it in summarizing the facts upon which it based its decision. Sacrificing brevity, we would like to point out conflicts in the opinion and the facts as presented in the Trial Court.

a. The court assumed that the portion of the crossing on which the four-foot planks were laid and where the petitioner was stalled constituted the "shoulder" of the road (R. 78, 82), while the following evidence clearly showed that this portion constituted part of the traveled portion of the highway:

(R. 14) "The sixteen-foot timbers extend partly across the roadway."

(R. 16) "Can you tell me why those timbers are placed there? A. To provide passage for automobiles."

(R. 29) Petitioner testified that when he got on the crossing, he was on the traveled portion.

(R. 32) One witness testified that the large timbers lacked about two or three feet from covering the normal roadbed from the south side and (R. 33) testified that the gap was on the traveled portion of the public road.

(R. 36) A witness for respondent testified the four-foot timbers were on the traveled portion.

b. The court stated that the petitioner "knew that trains frequently reached the crossing at the same time" (R. 79, 87), while the petitioner's undisputed evidence showed "that sometimes a train would come along at that particular hour, but not frequently" (R. 25).

c. The court stated there was no evidence that any other persons had experienced any difficulty in crossing the crossing (R. 81), while respondent's witness testified that, "I have bumped over those four ties" (R. 32).

d. The court stated that the crossing was constructed and maintained in fair compliance with the statute requiring that the crossing be flush with the rails (R. 82), while the evidence showed that the southern portion of the crossing which constituted part of the traveled portion was at least four to six inches beneath the top of the rails (R. 14, 32, 36), and common knowledge would dictate that such a depression is likely to cause automobiles to be stalled, or other mishaps.

Applicable to the question of contributory negligence which will be later discussed, the court assumed that petitioner could not have heard a warning had it been sounded (R. 84, 88). This assumption is in direct conflict with petitioner's positive testimony wherein he testified he was

so situated to have heard the signal (R. 19, 27); that he was attentive (R. 19, 27, 28, 29); and that he would have heard the warning if one had been sounded (R. 27, 29).

Notwithstanding the conflicts in the evidence, the Lower Court usurped the function of the jury and substituted the judgment of the majority of the court for that of the jury. In so doing, it has deprived your petitioner of his right to trial by jury under the Seventh Amendment of the Constitution of the United States. Wilkerson v. McCarthy, etc., 336 U. S. 53, 69 S. Ct. 413, 93 L. ed. 497; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. ed. 916; Parsons v. Bedford, 3 Peter 433, 28 U. S. 433, 7 L. ed. 732; Bernier v. Illinois Central Railroad Co., 296 Ill. 464, 129 N. E. 747.

This court has consistently held that it is only where there is an entire absence of any probative evidence that a verdict may be directed. Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. ed. 916; Tiller v. Atlantic Coastline R. Co., 318 U. S. 64, 68, 63 S. Ct. 444, 451, 87 L. ed. 610; Bailey v. Central Vermont R., Inc., 319 U. S. 350, 63 S. Ct. 1062, 87 L. ed. 1444.

The rule of these cases is not restricted to actions under the Federal Employers' Liability Act, but to all law actions as well. Pa. R. R. Co. v. Goldie, C. C. A. 4th, 182 F. 2d 9, 12.

II.

The Lower Court held that there was no evidence to raise an issue of fact on the question of respondent's failure to sound warning as the locomotive approached the crossing, and stated that under the rule prevailing in Illinois, the proof is that the train sounded the crossing warning (R. 83, 88). In so holding, the Lower Court has accepted the evidence most favorable to respondent and has ignored the evidence presented by the petitioner. The evidence clearly

showed that the petitioner would have heard the warning had it been sounded (R. 27, 29), yet the Lower Court assumes that the respondent would not have heard it (R. 84, 88). The Lower Court's holding that the Illinois decisions are to the effect that the testimony of a witness that he heard no locomotive bell or whistle before a crossing accident is merely negative in character and raises no issue of fact for the jury, is contrary to the law of Illinois. Berg v. N. Y. C. R. Co., 391 Ill. 52, 62 N. E. 2d 676, 681 (which repudiated contrary statements in Morgan v. New York Central Railroad Co., 327 Ill. 339, 158 N. E. 724, which was used as the sole authority in Provenzano v. Illinois Central Railroad Co., 357 Ill. 192, 191 N. E. 287, cited as authority by the Lower Court). The Lower Court's decision to the effect that "negative evidence" in a case of this type does not raise a question of fact for the jury is contrary to the decisions of other Federal Courts of Appeal. Union Pac. R. Co. v. Burnham, C. C. A. 10, 124 F. 2d 500, 502; Flannery v. N. Y. O. & W. R. Co., C. C. A. 2, 29 F. 2d 18, 19; Norfolk & W. Ry. Co. v. Collingsworth, C. C. A. 6, 52 F. 2d 827.

If the Lower Courts are permitted to expand this "negative evidence" rule to the extent applied in the instant case, it will definitely foreclose rights of individuals who must of necessity rely on "negative evidence" to prove their cause of action or defend an action against them. In holding that the positive evidence conclusively proved that the warning was sounded, the Lower Court invaded the province of the jury, for it was for the jury to determine the credibility and the weight of this evidence; they were not bound to accept respondent's testimony as true.

III.

The evidence showed that the plaintiff's automobile was caused to be stalled on the crossing due to the defective

condition thereof and that this fact was found by the Lower Court (R. 87). Thereafter, the petitioner attempted to remove his car from the crossing. It was admitted that the train in question approached the crossing at the speed of thirty-nine to forty miles per hour and that this speed was not slackened until the time of collision (R. 34, 35). The evidence further showed that the operators of the locomotive, by the exercise of ordinary care to keep a lookout, could have discovered the petitioner in his perilous position when the train was between six hundred and seven hundred feet from the point of collision (R. 21, 27). It was further shown that by the application of the brakes, the train could have slowed to twenty miles per hour within four hundred feet, and that in six hundred feet, the train would not be moving very fast (R. 50). Accepting the evidence in the light most favorable to the petitioner, the evidence showed that no warning was sounded as the train approached. The petitioner's evidence showed that he discovered the train when it was one hundred fifty feet from the crossing, and he thereafter attempted to get out of the automobile and was successful in getting the door open but did not reach a place of safety (R. 19, 20).

In applying the law of Illinois to these facts, the Lower Court stated that for actions to constitute willful and wanton misconduct, there must be evidence of an intentional act or a failure through recklessness as distinguished from ordinary care to discover the peril of an individual (R. 83). This constituted a plain misconstruction of the decisions of the Illinois courts. The courts there hold that willful and wanton misconduct is a failure to exercise ordinary care to avoid known danger or being unaware of it only through carelessness (where there is a duty to be on the lookout). Brown v. Ill. Term. R. R. Co., 319 Ill. 326, 150 N. E. 242, 244; Schneiderman v. Interstate Transit Lines, Inc., 394 Ill. 569, 69 N. E. 2d 293, 300.

The evidence clearly showed that the operators of the locomotive could have, by the exercise of ordinary care in maintaining a lookout, discovered the petitioner in his perilous position, and they could thereafter have slackened the speed of the locomotive to such an extent to have afforded the petitioner an opportunity to have reached a place of safety. This conclusively shows that the Lower Court misapplied the Illinois law so as to deprive your petitioner of his right of recovery.

The law of Illinois is further to the effect that willful and wanton misconduct is an intentional disregard of a known duty. Baltimore & Ohio R. Co. v. Felgenhauer, C. C. A. 8, 168 F. 2d 12, 16; Reell v. Cent. Ill. Elec. & Gas Co., 317 Ill. App. 106, 45 N. E. 2d 500, 502. The evidence clearly showed that the respondent failed for more than five years to maintain the crossing flush with the rails as required by the statute (R. 32, 38). It intentionally disregarded a known duty which had been placed on it by statute and was thus guilty of willful and wanton misconduct. In one portion of the opinion, in dealing with willful and wanton misconduct, the Lower Court concedes "that accepting the evidence most favorable to petitioner", they find that his car became stalled on the crossing because of respondent's failure to maintain the crossing as required by law (R. 87), yet earlier in the opinion, they hold that the crossing was maintained in fair compliance with the statute (R. 92). The two holdings are contradictory. The purpose of the statute requiring the crossing to be maintained flush with the rails was to prevent travelers from becoming stalled thereon. This crossing did not meet that requirement and had been in that condition for at least five years, and as a direct result thereof, petitioner was injured. How can the Lower Court state that the respondent had fairly complied with the statute and had not violated a known duty? To do so the court of necessity failed to consider evidence favorable to your petitioner and has misinterpreted the applicable law.

IV.

The question of contributory negligence is ordinarily one of fact for the jury and becomes one of law only where there is entire absence of any probative evidence tending to show due care. If there may be a difference of opinion on the question so that reasonable minds will arrive at different conclusions, then it is a question of fact for the jury. Surdyk v. Indiana Harbor Belt R. Co., C. C. A. Ill. 45, 148 F. 2d 795; Elgin, Joliet & Eastern R. Co. v. Duffy, 191 Ill. App. 489, 491.

The evidence showed that after the petitioner had become stalled upon the crossing as a direct result of the negligence of the respondent, he thereafter listened for a warning that should have been sounded by any approaching locomotive, and, while attempting to start his motor and remove his car from the track, he kept watch to the best of his ability for approaching trains. He discovered the approaching train, even though no warning sounded, within a few seconds after it came in his range of vision, and immediately attempted to leave his automobile, yet the majority of the opinion of the court held that as a matter of law, he was guilty of contributory negligence in attempting to remove his car from the crossing. This was based on the erroneous assumption that a warning was sounded. As pointed out in the dissenting opinion of the Lower Court (R. 89), the cases relied upon as authority by the majority opinion were cases where the claimant was approaching the crossing and were not analogous to the present situation. We have here a situation where one of three judges holds that reasonable minds might differ on the question of the petitioner's contributory negligence, and yet the verdict of the jury and the judgment of the court holding that the plaintiff was not guilty of contributory negligence is reversed by an opinion wherein reasonable minds differ. It seems to be a clear violation

of your petitioner's constitutional right of a trial by jury for the verdict of twelve jurors and the judgment of the trial court to be brushed aside by a divided opinion of the court when each must obey the rules laid down that where reasonable minds might differ, the question is one for the jury.

The Lower Court erred in applying an unsound and prejudicial rule to determine whether the question of contributory negligence was one of fact or of law. A reading of the opinion will obviously show that the test applied by the court was: "If the petitioner could under any circumstances have avoided his injuries and he failed to do so, then he was guilty of contributory negligence as a matter of law." The true test is not whether he might, by the utmost care, have avoided his injuries but whether his failure to do so constituted a failure to exercise ordinary care under the circumstances. Randolph v. N. Y. Cent. R. Co., 334 Ill. App. 268, 79 N. E. 2d 301, 302; Surdyk v. Indiana Harbor Belt R. Co., C. C. A. Ill., 148 F. 2d 795, 798; Ill. Cent. R. R. Co. v. Anderson, 184 Ill. 294, 303. And in deciding this issue, the court should have given due consideration to the fact that petitioner was placed in the perilous position as a result of the negligence of the respondent, and should have considered the fact that petitioner had some right to remove his property from the track, and there was some duty resting upon him to do so and not to imperil the lives of persons who might be on a train.

In unusual cases such as the one here presented, the courts may not as a matter of law declare that any given conduct constituted negligence. As Judge Johnson said in his dissenting opinion (R. 89), "It is fundamental that no absolutism should be laid down by any court for human conduct, except where it is possible to say with natural or experiential certainty that the prescription made is what

the ordinary prudent man would or would not have done in such a situation and so represents what all men must or must not do."

To the same effect was the declaration of this court in Pokora v. Wabash Railroad Co., 292 U. S. 98, 104, 78 L. Ed. 1149, 1154, 54 S. Ct. 580, wherein this court said, "Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life." The court further stated (l. c. 105), "Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury."

V.

Petitioner earnestly contends that the rulings of the Court of Appeals complained of herein are unsound and constitute a novel and unprecedented theory as to what constitutes contributory negligence, willful and wanton misconduct, and that negative testimony has no probative value whatever. If this decision should become the law of this case, the rule applicable to the determination of when contributory negligence becomes one of law has lost all force and effect, the interpretation of the Illinois statute which unequivocally states that the crossings must be maintained flush with the rails has lost its meaning, and persons who must rely upon negative testimony must of

necessity be deprived of their rights since, under the opinion of this court, such testimony has no probative value.

Petitioner therefore prays that the court issue its Writ of Certiorari herein, and that the judgment herein of the United States Court of Appeals for the Eighth Circuit be reversed and the judgment of the District Court herein be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. ..379..

HAROLD G. FREUND,
Petitioner,

v.

GULF, MOBILE AND OHIO RAILROAD COMPANY,
a Corporation,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

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STATEMENT.

On January 3, 1947, petitioner became stalled in his automobile on respondent's railroad grade crossing (R. 19). The automobile became stalled because of insufficient ballast between the rails at the point where petitioner had attempted to drive across the tracks (R. 14). Weather conditions limited his visibility to 600 to 700 feet (R. 25). He knew that trains sometimes reached the crossing at that time of day (R. 26). Respondent's train approached the

crossing at a speed of 38 to 40 miles per hour (R. 34, 45, 47), while petitioner was attempting to start his automobile and proceed across the tracks. He did not see the train until it was 150 feet from him, and he was unable to get out of the automobile before it was struck by the train, resulting in the injuries for which he filed this suit (R. 19, 20).

The jury returned a verdict in favor of petitioner (R. 64). The United States Court of Appeals for the Eighth Circuit reversed the judgment outright holding that petitioner was guilty of contributory negligence as a matter of law and that his contributory negligence barred recovery, because the evidence could not support a finding that respondent was guilty of wilful and wanton misconduct in the maintenance of the crossing nor in the operation of the train (R. 88).

ARGUMENT.

I.

On pages 18 and 19 of his brief petitioner has alleged that the Lower Court (Court of Appeals for the Eighth Circuit) misinterpreted the facts on four occasions. We will consider those separately.

a. Petitioner complains that the Lower Court assumed that the portion of the crossing where he became stalled was the "shoulder" of the road.

The evidence showed that the center of the road was paved and that the outer edge, over which plaintiff traveled in order to get better traction, was gravel. The Lower Court used the term "shoulder" only as a convenient description but did not hold that the "shoulder" was not part of the traveled portion.

Actually, any misinterpretation which there may have been is of no consequence, because the Lower Court conceded that respondent failed to maintain the crossing in accordance with the state statute but held that the failure established nothing more than respondent's negligence and did not establish wilful and wanton misconduct, which was the real issue of law on that phase of the case.

b. Although the Lower Court may have been incorrect in stating that petitioner "knew that trains frequently reached the crossing at the same time"; still in considering the applicable law it is sufficient that petitioner knew that "sometimes" a train came at that hour (R. 26). "Sometimes" instead of "frequently" was still notice to petitioner that he could expect a train to appear.

c. The witness who said, "I have bumped over those four ties" also said, "I have never had any difficulty that

I know of in crossing there in the 16 years that I have driven over it [the crossing]" (R. 32), and the Lower Court was correct in stating that there was no evidence that any other person had experienced any difficulty in driving over the crossing (R. 81).

d. The Lower Court did not state that the crossing was constructed and maintained in fair compliance with the statute, but instead the Lower Court applied that description only to "the paved portion of the road, the part usually traveled by motorists" (R. 82), and conceded that respondent had failed to maintain the "crossing" in compliance with the statute (R. 83).

Petitioner also complains that the Lower Court erroneously assumed that petitioner could not have heard a warning had it been sounded (Petitioner's Brief, p. 19). The Lower Court did not draw such an assumption but held that the evidence failed to prove that the whistle was not blown even though petitioner testified that he heard no whistle and "could" have heard a whistle had it been blown, and the Lower Court based its decision on the fact that petitioner's attention was directed to other matters ("getting off the track"), his hearing ability was decreased by other noises ("when his motor was not running he was 'grinding on the starter' "), and "there was independent positive evidence to the contrary" (R. 84).

II.

The Lower Court properly held that "there was no evidence that the alarm was not sounded" (R. 83). That conclusion of law was not contrary to the Illinois law nor the law of the Federal Courts as declared in the cases cited by petitioner on page 21 of his brief. In **Berg v. N. Y. C. R. Co.**, 391 Ill. 52, 62 N. E. 2d 676, l. c. 680, which case is cited by petitioner, the Supreme Court of Illinois said:

> "It is obvious that if a witness, without explanation of his evidence, testifies that he did not hear a bell or whistle, such testimony would have no value. To give it probative force, it must appear that the witness was in such proximity that he could have heard the sound had it been given, and that his attitude of attention was such that if the bell or whistle had sounded it would have attracted his attention."

In each of the federal cases cited by petitioner the same rule is set out—requiring that the circumstances of the witness' ability to hear and attentiveness be established **before** the negative evidence shall have any probative effect. As pointed out by the lower court, petitioner "had his attention directed to other matters—[and] his hearing ability decreased by other noises and—there was independent positive evidence" that the whistle was sounded (R. 84).

The burden was on petitioner to prove that the warning signal was not given, and as a matter of law he did not sustain that burden.

III.

(a)

Petitioner alleges that the lower court was incorrect in holding that there was no evidence to support a finding that defendant was guilty of wilful and wanton misconduct in the operation of the train (R. 22, 23). Petitioner's misconception of the law is based upon two erroneous conclusions drawn by him. First, he alleges that: "The evidence clearly shows that operators of the locomotive could have, by the exercise of ordinary care in maintaining a lookout, discovered the petitioner in his perilous position, and they could thereafter have slackened the speed of the locomotive to such an extent to have afforded

the petitioner an opportunity to have reached a place of safety" (Petitioner's Brief p. 23).

The only evidence set out by petitioner is that **after** application of the brakes in **emergency** a train traveling at 40 m. p. h. would be slowed to 20 m. p. h. within 400 feet and that within 600 feet the train would not be moving very fast (R. 50). That is not evidence showing that by exercise of ordinary care the train could have been slowed sufficiently to permit petitioner to escape. Such a conclusion ignores the fact that the operators were not required to see petitioner immediately as he came into view, the fact that the operators would have to take a moment or more to determine that an emergency existed, the fact that human reactions would take some seconds in which to transform into motion the decision of the brain, and the fact that the mechanical workings of the brakes also requires some time. All of that time is ignored by petitioner, and there is no evidence in the record to establish what those times would total. The lower court was correct in its statement that there was no evidence to show that the train could have been stopped or slowed sufficiently to avoid injury to petitioner (R. 84, 85).

Petitioner's second erroneous conclusion is one of law. Even if there was evidence to establish that the train could have been slowed sufficiently to permit plaintiff to escape, still the law of Illinois would not permit a finding of wilful and wanton misconduct on that alone, as petitioner urges. Such evidence would prove only negligence.

> "In order to constitute wilful and wanton misconduct the injury must either have been intentionally inflicted, or produced by acts so grossly negligent as to exhibit a reckless disregard for the safety of others." **Provenzano v. Illinois Central R. Co.**, 357 Ill. 192, 191 N. E. 287, l. c. 288.

"Negligence and wilful and wanton misconduct are not synonymous. As has been pertinently observed, 'Negligence and wilfulness are as unmixable as oil and water.' " **Gately v. Chicago and E. I. R. Co.** (C. C. A. 7), 138 F. 2d 222, l. c. 227.

Petitioner has cited (on page 22 of his brief) **Brown v. Ill. Term. R. R. Co.**, 319 Ill. 326, 150 N. E. 242, 244, and **Schneiderman v. Interstate Transit Lines, Inc.**, 394 Ill. 569, 69 N. E. 2d 293, 300. Those two cases do not support petitioner's theory of recovery in this case, because in each case the operator of the defendant's vehicle (train and bus, respectively) **admittedly saw** the plaintiff approaching a dangerous situation and then failed to do anything to avert the impending accident, which failure was held to constitute intentional disregard of a known duty. But in the case at bar there is no evidence that the operators of defendant's train saw plaintiff stalled on the crossing and then failed to act to avert a collision. If by the exercise of ordinary care they could have seen plaintiff when he first came into view, their failure to see him would constitute nothing more than negligence and could not be held to have been wanton and wilful misconduct. The Lower Court was correct in holding:

"There is no evidence to support a finding that the enginemen intentionally failed to stop the train before striking appellee, or that they failed through recklessness, as distinguished from ordinary care, to discover his peril in time to avoid the collision" (R. 83).

(b)

On page 23 of his brief petitioner says, "The evidence clearly showed that the respondent failed for more than five years to maintain the crossing flush with the rails as required by the statute (R. 32, 38). It intentionally disregarded a known duty which had been placed on it by

statute and was thus guilty of wilful and wanton misconduct." Petitioner does not explain how he concludes that there was an **intentional** disregard of a known duty, apparently because there can be no explanation. The record is void of any hint of intent on the part of defendant. There was no evidence of knowledge or notice of the defect in the crossing. Under petitioner's theory, the violation of any statute would constitute wilfulness and wantonness.

IV.

Throughout petitioner's argument relating to contributory negligence (Petitioner's Brief, pp. 24-26), he complains that the Lower Court held that petitioner was guilty of contributory negligence in attempting to remove his car from the crossing. That is not a correct analysis of the Court's opinion. The Lower Court found contributory negligence from plaintiff's failure to exercise care to look and listen for approaching trains and not from his attempt to remove his automobile from the crossing, and from applicable Illinois law the Lower Court found that:

> "A motorist stalled on a railroad track, where from past experience he knows a train is liable to approach at any moment, does not exercise care commensurate with his perilous situation unless he looks and listens for trains as often and as constantly as looking and listening are necessary to enable him to avoid injury" (R. 87).

The above quotation also answers petitioner's complaint that, "A reading of the opinion will obviously show that the test applied by the court was: 'If the petitioner could under any circumstances have avoided his injuries and he failed to do so, then he was guilty of contributory negligence as a matter of law' " (Petitioner's brief p. 25). The Lower Court analyzed the circumstances present and

declared what would be and would not be ordinary care under those circumstances. Petitioner has chosen to attack the Lower Court's method of explaining the law but has not questioned the law of the cases which support the decision and has not attempted to distinguish that law. That argument does not go to the merits of the case.

Petitioner alleges that his constitutional right of trial by jury has been denied him, because the verdict of twelve jurors and the judgment of the trial court was "brushed aside" by a divided opinion of the Lower Court when each must obey the rules laid down that, where reasonable minds might differ, the question is one for the jury (petitioner's brief pp. 24, 25). Petitioner's error is in his belief that the decision reversing the District Court was a decision of the individual judges, when in fact it was a decision of the Court of Appeals, a separate entity in itself. The Court and not the judges declared the **law** to be that reasonable minds could not differ on the question of contributory negligence. That declaration of **law** followed the decisions of the Illinois courts, and the dissent was a belief of an individual judge that the Illinois law would not hold that reasonable minds could not differ. This Court and its individual justices have performed the same acts of which petitioner complains. In the case of **Brady v. Southern Railway Company**, 320 U. S. 476, 88 L. ed. 239, this Court affirmed a judgment of the Supreme Court of North Carolina, which court had reversed a judgment for plaintiff obtained in the trial court. The question presented was whether or not there was evidence to support a finding that defendant was negligent. The majority opinion of this Court stated that:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding * * *" l. c. U. S. 479, L. ed. 243.

The decision, after reviewing the facts, held that reasonable minds could not differ and held that defendant was not negligent. Four judges dissented, and the language of the dissenting opinion is very similar to that employed by the petitioner in his brief:

> "Twelve North Carolina citizens who heard many witnesses and saw many exhibits found on their oaths that the railroad employees were negligent. The local trial judge sustained their finding. Four members of this Court agree with the local trial judge that the jury's conclusion was reasonable. Nevertheless five members of the Court purport to weigh all the evidence offered by both parties to the suit, and hold the conclusion was unreasonable." L. c. U. S. 484, 485, L. ed. 245.

Under the law of this land the decision concurred in by a majority of the individual judges became the decision of the Court and was binding on the litigants. If that were not so, a unanimous decision in all appellate courts would be required in order to upset a verdict of twelve jurors.

V.

Petitioner's testimony proved him guilty of contributory negligence as a matter of law. There is no evidence to prove that respondent was guilty of wilful and wanton misconduct; therefore petitioner is barred from recovery.

The accident occurred in Illinois and the substantive law of that state governs the case. The burden is on the plaintiff under Illinois law to prove that he was in the exercise of due care for his own safety, and failure to sustain that burden bars recovery; unless it is proved that the defendant was guilty of wilful and wanton misconduct. **Greenwald v. B. & O. R. Co.**, 332 Ill. 627, 164 N. E. 142.

The Court of Appeals, in the case at bar, decided against petitioner on both issues, and that decision was soundly based on the facts in evidence.

A.

Contributory Negligence.

When stalled in his automobile on the crossing, petitioner by his own admission could see 600 to 700 feet down the track (R. 21, 25, 26). It was undisputed that defendant's train approached the crossing at a sustained speed of 38 to 40 m. p. h. (R. 34, 45, 47). It was admitted that at a speed of 40 m. p. h. a train would travel 600 feet in 10 seconds (R. 28). Petitioner did not see the train until it was 150 feet from him (R. 27). Therefore, by Petitioner's own admission, Respondent's train traveled 450 to 550 feet in clear view of petitioner before he saw it. At 40 m. p. h. it would have taken the train a **minimum** of 7½ seconds to go that distance. During that time or for a longer time petitioner failed to make any attempt to determine whether or not he was in danger of being struck by a train (R. 27); yet he knew that sometimes a train would come along at that time (R. 26).

The courts of Illinois have declared that a railroad crossing is a dangerous place, and an automobilist must use care commensurate with the dangers.

> "The rule has long been settled in this state that it is the duty of persons about to cross a railroad track to look about them and see if there is danger, and not to go recklessly upon the track, but to take proper precaution to avoid accident. It is generally recognized that railroad crossings are dangerous places, and one crossing the same must approach the track with the amount of care commensurate with the

known danger, and when a traveler on a public highway fails to use ordinary precaution while driving over a railroad crossing, the general knowledge and experience of mankind condemns such conduct as negligence.

"One who has an unobstructed view of an approaching train is not justified in closing his eyes or failing to look or in crossing a railroad track in reliance upon the assumption that a bell will be rung or a whistle sounded. No one can assume that there will not be a violation of the law or negligence of others and then offer such assumption as an excuse for failure to exercise care. The law will not tolerate the absurdity of allowing a person to testify that he looked but did not see the train when the view was not obstructed, and where, if he had properly exercised his sight, he must have seen it."

Greenwald v. Baltimore & Ohio Railroad Co., 332 Ill. 627, 164 N. E. 142, l. c. 144.

To a like effect and based upon facts substantially similar to the case at bar are: **Gately v. Chicago and E. I. R. Co.** (C. C. A. 7), 138 F. 2d 222; **Provenzano v. Illinois Central R. Co.** (Ill. Sup.), 191 N. E. 287.

Petitioner alleged and submitted to the jury two theories of wilful and wanton misconduct—in failure to comply with the statute regarding maintenance of the crossing, and in operation of the train.

Assuming, as did the Lower Court, that the crossing did not comply with the requirements of the statute in that the roadway was not flush with the rails, still that is only proof of negligence and cannot be stretched to prove wilful and wanton misconduct. The record is void of any evidence of intent and is void of any evidence of notice to defendant that the crossing was defective. In fact it was

in fair compliance with the statute, because the defect which allegedly caused petitioner's automobile to stall was on that part of the crossing opposite the unpaved edge of the roadway, and the main traveled portion complied with the statute. There was no **gross** negligence or **reckless** disregard of the safety of plaintiff or others, as required in order to prove wilful and wanton misconduct.

> "In order to constitute wilful and wanton misconduct the injury must either have been intentionally inflicted, or produced by acts as grossly negligent as to exhibit a reckless disregard for the safety of others."
>
> **Provenzano v. Ill. Central R. Co.**, supra, 191 N. E. 287, 288.

Nor was there wilful and wanton misconduct in the operation of the train. There is no evidence that the trainmen saw petitioner stalled on the crossing and then failed to blow the whistle or slow the train; therefore, there is no evidence of intent.

On the question of wanton misconduct there are two matters for consideration. **First**, did the trainmen wantonly fail to blow the statutory warning signal? Under Point II of this argument we have discussed the ruling of the Lower Court to the effect that the evidence shows that the whistle was blown. In any event there is no probative evidence that it was not blown; therefore, there can be no recovery upon a theory that there was a wanton failure to blow the whistle. **Secondly**, did the trainmen wantonly fail to slow the train so as to allow petitioner to escape his automobile? Under Point III (a) of this brief we have discussed that question and have demonstrated that there is no evidence that the train could have been slowed sufficiently to permit petitioner to escape; and if there was such a failure, it would not be proof of wilful and wanton mis-

conduct. Therefore, petitioner cannot recover upon that theory, which leaves him with nothing to support him in his suit for damages. Petitioner's predicament was paralleled in the case of **Universal Concrete Pipe Co. v. Bassett** (Ohio Sup.), 200 N. E. 843, l. c. 845, 846, where that Court aptly observed:

> "Wantonness is a synonym for what is popularly known as 'cussedness,' and cussedness is a disposition to perversity. An act or omission does not become wanton at the whim or caprice of the pleader, any more than a threatened injury becomes irreparable simply because the pleader says so. Facts must be pleaded which reveal on their face the element of wantonness, and they must be proved as pleaded."

Defendant's engineer applied the brakes **as soon as he saw** that a collision was imminent (R. 45), but the accident was unavoidable. That is not evidence of a reckless disregard for the safety of others.

Finally, we have the proposition advanced by the Lower Court that even though the defendant might be found guilty of wilful and wanton misconduct, still the petitioner's disregard for his own safety was just as wanton and just as wilful, which would bar his recovery. **Restatement of Torts**, Vol. 2, § 503; **Schneiderman v. Interstate Transit Lines, Inc.**, 394 Ill. 569, 69 N. E. 2d 293.

CONCLUSION.

Petitioner's own testimony conclusively convicted him of contributory negligence as a matter of law. In order to prevent that from barring his recovery he had to prove that respondent was guilty of wilful and wanton misconduct. He had the foresight to plead such misconduct, but he failed to sustain the burden of proving it; therefore, he

was legally barred from effecting a recovery, and the Court of Appeals was legally correct in so holding.

Respectfully submitted,

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